

EXHIBIT B

1
2
3
4
5
6
7 PEOPLE OF THE STATE OF
8 CALIFORNIA, ACTING BY AND
9 THROUGH SAN FRANCISCO CITY
10 ATTORNEY DAVID CHIU,

11 Plaintiff,

12 v.

13 INCOMM FINANCIAL SERVICES, INC.,
14 et al.,

15 Defendants.

16 Case No. [3:23-cv-06456-WHO](#)

17 **ORDER GRANTING MOTION TO
18 REMAND**

19 Re: Dkt. No. 28

20 The People of the State of California, by and through San Francisco City Attorney David
21 Chiu (“the City”), filed this lawsuit against defendants InComm Financial Services, Inc.
22 (“InComm”), TBBK Card Services, Inc. (“TBBK”), Sutton Bank (“Sutton”) and Pathward N.A.
23 (“Pathward”) in state court. The defendants removed the case to federal court based on diversity
24 jurisdiction, and now the City moves to remand it. Because the State of California is the real party
25 in interest here, and California is not a citizen of any state for the purposes of diversity
26 jurisdiction, there is no federal jurisdiction to hear this suit. For that and the following reasons,
27 the City’s motion is granted.

28 **BACKGROUND**

29 **I. FACTUAL BACKGROUND**

30 The following facts are alleged in the plaintiff’s complaint. (“Compl.”) [Dkt. No. 1-1] Ex.
31 B. Defendant InComm is a South Dakota corporation headquartered in Georgia that provides
32 “payment-related services” to consumers and business. *Id.* ¶ 9. One of its products is called a
33 “Vanilla card.” *Id.* ¶ 9. These cards function as nonreloadable debit cards and, like debit cards,

1 can be used as an alternative to cash. *Id.* ¶¶ 1, 21–22. They are sold directly to consumers and are
 2 not intended or designed to be used for business purposes. *Id.* ¶ 26. They are sold in-store at
 3 retailers throughout California and in San Francisco, and they can also be purchased online. *Id.*
 4 ¶ 31. The other defendants--TBBK, a South Dakota corporation headquartered in South Dakota;
 5 Sutton, an Ohio corporation headquartered in Ohio; and Pathward, a Delaware corporation
 6 headquartered in South Dakota--issue the Vanilla cards sold and serviced by InComm, including
 7 cards sold in San Francisco and throughout California. *Id.* ¶¶ 10–12.

8 The City alleges that Vanilla card purchasers and consumers have, since at least 2013, been
 9 impacted by a practice called “card draining.” *Id.* ¶¶ 41, 43. This occurs when the funds on a card
 10 are used or drained by a third-party without the cardholder’s permission, and often before the
 11 cardholder has ever had the chance to use the card. *Id.* ¶¶ 41–43. The City alleges that this
 12 “relatively unsophisticated crime” is made possible by InComm’s lax and inadequate security
 13 measures. *Id.* ¶ 50. It asserts that InComm knows about the card draining, and knows how and
 14 why its cards are drained, but has failed to implement reasonable security measures to make its
 15 products less susceptible to theft. *Id.* ¶¶ 53–73. The City also alleges that the defendants fail to
 16 provide refunds to Vanilla card consumers, in contravention of their legal obligations. *Id.* ¶¶ 74–
 17 93.

18 The complaint asserts that consumers are likely to be misled about the security of the
 19 Vanilla cards and about InComm’s refund process. *See id.* ¶¶ 94–103. It also alleges that the
 20 defendants’ conduct harms consumers by forcing them to spend time and money waiting for
 21 refunds, by shaming consumers when their cards are declined for lack of funds, and by
 22 embarrassing consumers that give the cards as gifts, only to be told by the recipient that there were
 23 no funds on the card. *Id.* ¶¶ 104–11.

24 **II. PROCEDURAL BACKGROUND**

25 This lawsuit was filed in state court, alleging that the defendants violated California’s
 26 Unfair Competition Law (“UCL”), Cal. Bus. & Prof. Code § 17200, et seq; *see* Compl. ¶¶ 118–24.
 27 The City seeks an injunction, restitution, and civil penalties. *See* Compl. at pp. 41–42.

28 InComm removed the case to this court with the consent of the other defendants. [Dkt. No.

1. The City has moved to remand the case to state court. (“Mot.”) [Dkt. No. 28.]. InComm filed
2 an opposition. (“InComm Oppo.”) [Dkt. No. 30.]. Pathward also filed an opposition. (“Pathward
3 Oppo.”) [Dkt. No. 31.]. The City replied. (“Repl.”) [Dkt. No. 33.]. I vacated the hearing because
4 the motion was adequately presented on the papers.

5 **LEGAL STANDARD**

6 Generally, a case can only be removed from state to federal court when the federal court
7 would have had original jurisdiction over it. 28 U.S.C. § 1441(a). Under 28 U.S.C. § 1332(a)(1),
8 federal diversity jurisdiction exists when each plaintiff is a citizen of a different state from each
9 defendant and the amount in controversy exceeds \$75,000. Natural persons are the citizens of the
10 state in which they are domiciled—that is, the state in which they reside with intent to remain
11 permanently. *See Adams v. W. Marine Prod., Inc.*, 958 F.3d 1216, 1221 (9th Cir. 2020).

12 But a state is not considered to be a citizen of anywhere, and where a state brings a case
13 under its own state law, federal courts do not have diversity jurisdiction. *See Mississippi ex rel.*
14 *Hood v. AU Optronics Corp.*, 571 U.S. 161, 174 (2014) (citing *Mo., Kan. & Tex. Ry. Co. v.*
15 *Hickman*, 183 U.S. 53, 57 (1901) (“Missouri Railway”)). Therefore “neither a state nor a state
16 agency [can] be a party to a diversity action.” *Dep’t of Fair Emp. & Hous. v. Lucent Techs., Inc.*,
17 642 F.3d 728, 737 (9th Cir. 2011) (“*Lucent*”) (citation omitted). However, the “mere presence” of
18 the state as the party plaintiff does not defeat diversity jurisdiction unless its interests “satisfy the
19 real party to the controversy requirement.” *Id.* (citations omitted).

20 Whether a state is the real party in interest for diversity jurisdiction purposes is a question
21 of federal law, although the inquiry is informed by state law. *In re Facebook, Inc., Consumer*
22 *Priv. User Profile Litig.*, 354 F. Supp. 3d 1122, 1124 (N.D. Cal. 2019). This rule is the same
23 when the plaintiff is not the state itself but has brought suit on behalf of the state, so long as the
24 state is the “real party in interest.” *Id.* at 1124.

25 “[R]emoval statutes should be construed narrowly in favor of remand to protect the
26 jurisdiction of state courts.” *Cnty. of San Mateo v. Chevron Corp.*, 32 F.4th 733, 764 (9th Cir.
27 2022) (citation omitted). “The defendant has the burden of proving by a preponderance of the
28 evidence that the requirements for removal jurisdiction have been met.” *Id.* at 746 (citation

1 omitted).

2 DISCUSSION

3 The crux of the motion requires me to decide whether the City or the State of California is
 4 the real party in interest. The parties agree that a state is not a citizen for diversity jurisdiction
 5 purposes and agree that if a state brings a lawsuit under state law, there is no basis for federal
 6 jurisdiction. *See Mississippi*, 571 U.S. at 174. The City argues that California is the real party in
 7 interest given the nature of the proceedings, the UCL's goal of protecting the public's economic
 8 and social well-being, the statutory authorization allowing the City to step into the shoes of the
 9 State, and the relief requested. *See generally* Mot. In opposition, the defendants argue that the
 10 City is the real party in interest because the lawsuit protects and promotes only San Francisco's
 11 interests and seeks relief that will benefit only the City. *See generally* Oppo.

12 Two cases guide the determination of whether the state is the real party in interest: *Lucent*,
 13 642 F.3d 728, and *Nevada v. Bank of America Corp.*, 672 F.3d 661 (9th Cir. 2012). *See*
 14 *California v. Purdue Pharma L.P.*, No. SACV 14-1080-JLS DFM, 2014 WL 6065907, at *2 (C.D.
 15 Cal. Nov. 12, 2014). “[T]he overall test is whether the government official or entity's lawsuit
 16 would primarily vindicate state interests and primarily obtain relief for the state, rather than
 17 serving primarily parochial interests and obtaining parochial relief.” *In re Facebook*, 354 F. Supp.
 18 3d at 1129. This inquiry requires courts to consider the case as a whole and examine “the essential
 19 nature and effect of the proceeding as it appears from the entire record.” *Nevada*, 672 F.3d at 670
 20 (quoting *Lucent*, 642 F.3d at 740).

21 I. THE NATURE OF THE PROCEEDINGS AS A WHOLE

22 The defendants argue that the City fails to allege any harm to the state as a whole and
 23 instead presumes that the State is always a real party in interest whenever a government entity
 24 brings suit under the UCL. Pathward Oppo. 5–6, 10; InComm Oppo. 8–11. In turn, the City
 25 asserts that this lawsuit protects and promotes California consumers as a whole and so primarily
 26 vindicates the State's interest in enforcing its consumer protection laws. Mot. 7–10.

27 In examining the nature and proceedings as a whole, the guiding inquiry asks “what
 28 interest California has in this litigation pursuant to its laws.” *Lucent*, 642 F.3d at 738. Though a

1 state's quasi-sovereign interest in enforcing state law does not necessarily make it the real party,
 2 *see id.*, it is sufficient when that interest is the primary one in the case, *Nevada*, 672 F.3d at 671.

3 Additionally, "the California Supreme Court and the Ninth Circuit have confirmed that 'a
 4 civil action brought by a governmental entity under [the UCL] is "fundamentally a law
 5 enforcement action designed to protect the public and not to benefit private parties.'"'" *California*
 6 *v. HomeAway.com, Inc.*, No. 2:22-CV-02578-FLA-JPRX, 2023 WL 2497862, at *2 (C.D. Cal.
 7 Mar. 14, 2023) (citing *City & Cnty. of San Francisco v. PG & E Corp.*, 433 F.3d 1115, 1125–26
 8 (9th Cir. 2006)). "The public has a substantial and specific interest in enforcing consumer
 9 protection laws." *Id.* (citing *Vasquez v. Super. Ct.*, 4 Cal. 3d 800, 808 (1971) (subsequent history
 10 omitted)).

11 In *Lucent*, 642 F.3d at 735–36, the Ninth Circuit determined that the state agency, rather
 12 than the State itself, was the real party in interest, where the discrimination lawsuit alleged that a
 13 single individual was subjected to disability discrimination and retaliation at work. The plaintiff-
 14 state agency argued that the State was the real party in interest because the statute at issue, the Fair
 15 Employment and Housing Act, "state[d] that California has its own interest in such litigation,"
 16 including "to protect and safeguard the right and opportunity of all persons to seek . . .
 17 employment without discrimination," avoid domestic unrest, support full utilization of workers,
 18 and protect the interests of employees, employers, and the public in general. *Id.* at 738 (citing Cal.
 19 Gov't Code § 12920). But the Ninth Circuit determined that these were "general government
 20 interest[s]" insufficient to satisfy the real party in interest requirement. *Id.* at 738–39 (citing
 21 *Missouri Railway*, 183 U.S. at 60).

22 In contrast, in *Nevada*, 672 F.3d at 664, 670–71, the Ninth Circuit determined that the
 23 State of Nevada was the real party in interest in a lawsuit brought by the state Attorney General
 24 against an out-of-state bank for allegedly fraudulent mortgage and foreclosure practices. The
 25 court noted that the Attorney General sued pursuant to a statute that specifically authorized it to
 26 bring an action in the name of the state as a whole, and that the suit sought to protect hundreds of
 27 thousands of aggrieved homeowners, which affected the state economy as a whole. *See id.* at 665,
 28 670. Looking at the "case as a whole" and the "essential nature and effect of the proceeding," the

1 court determined that Nevada was the real party in interest. *Id.* at 670.

2 The Central District reached similar conclusions in two suits brought under the UCL. In
 3 *Purdue Pharma*, 2014 WL 6065907, at *1–3, county counsel sued pharmaceutical manufacturers
 4 for allegedly deceptive marketing that created an “epidemic” of opioid abuse. The court reasoned
 5 that the UCL permits local prosecutors to bring cases in the name of the people of the State and
 6 that this lawsuit sought to address harm ““jeopardizing the health and safety of all Californians,””
 7 so the State was the real party in interest. *Id.* at *3 (citations omitted). Similarly in *HomeAway*,
 8 2023 WL 2497862, at *1, the City Attorney sued an online platform for short-term housing rentals
 9 for allegedly violating local law by failing to properly register hosts. The court again noted that a
 10 suit brought by the government under the UCL is “fundamentally a law enforcement action
 11 designed to protect the public,” and that because the lawsuit sought to eliminate unlawful business
 12 practices that contributed to the statewide housing crisis, the State had a concrete interest in the
 13 lawsuit. *See id.* at *2–3, 10 (citations omitted).

14 Here, the proceedings are akin to *Nevada*, *Purdue Pharma*, and *HomeAway.com*, because
 15 they seek to assert statewide protections under the UCL and protect California consumers as a
 16 whole. *See id.* at *2. The alleged harms widely affect California consumers and the state
 17 economy, including the risk of serious financial harms created by unpaid or late bills, Compl.
 18 ¶¶ 109–10, embarrassment to consumers, *id.* ¶¶ 105–08, time wasted with customer service, *id.*
 19 ¶¶ 105–06, and the impact of unfair and fraudulent business practices on the state, *id.* ¶¶ 112–24.
 20 By seeking to ameliorate these harms to state consumers, this lawsuit emphasizes and promotes
 21 California’s strong state interest in ensuring a fair marketplace and effectively enforcing its
 22 consumer protection laws—much like the state in *Nevada*, *Purdue Pharma*, and *Homeaway*, and
 23 unlike the overly “general” interest discussed in *Lucent*, 642 F.3d at 740.

24 Importantly too, the statutory authorization to bring this suit on behalf of California shows
 25 that the “essential nature” of the proceeding benefits state interests. *See Nevada*, 672 F.3d at 670.
 26 The UCL specifically authorizes the city attorney of any “city and county”—like San Francisco—
 27 to bring suits “in the name of the people of the State of California” against entities that engage in
 28

1 unfair competition. Cal. Bus. & Prof. Code § 17206(a).¹ This parallels the statute in *Nevada*,
 2 which allowed the attorney general to “bring an action in the name of the State of Nevada” against
 3 entities that “engaged or [are] engaging in a deceptive trade practice.” 672 F.3d at 671 (quoting
 4 Nev. Rev. Stat. § 598.0963(3)); *see also In re Facebook*, 354 F. Supp. 3d at 1125 (similar, under
 5 Illinois law). It is unlike the general-purpose language of the statute in *Lucent*, which did not
 6 specifically authorize suits on behalf of the state but rather merely explained the importance of
 7 protecting and safeguarding the rights of the public. 642 F.3d at 738 (citing Cal. Gov’t Code
 8 § 12920). And it also counters the defendants’ arguments that the plaintiffs are improperly
 9 assuming that all UCL lawsuits are brought on behalf of the state: instead, the Ninth Circuit and
 10 California Supreme Court “have confirmed that a civil action brought by a *governmental entity*
 11 under [this statute] is fundamentally a law enforcement action designed to protect the public and
 12 not to benefit private parties.” *Homeaway.com, Inc.*, 2023 WL 2497862, at *2 (quoting *PG&E*
 13 *Corp.*, 433 F.3d at 1125–26) (quotation marks omitted)(emphasis supplied); *see also People v.*
 14 *Pac. Land Rsch. Co.*, 20 Cal. 3d 10, 17 (1977). The State is the real party in interest.

15 The defendants also argue that the complaint fails to allege sufficient harm to California
 16 citizens as opposed to residents in other states, but this is unpersuasive. First, contrary to
 17 InComm’s assertion, the complaint names specific California residents allegedly harmed by the
 18 defendants’ practices. *See, e.g.*, Compl. ¶ 106. Second, the defendants cite no law to support their
 19 argument that the plaintiff must show a certain proportion of harmed consumers reside in
 20 California. *See* Pathward Oppo. 11; *see also Cnty. of San Mateo*, 32 F.4th at 764 (noting the
 21 burden is on the defendant to show that the requirements for removal are met). Indeed, the
 22 examples of alleged harm against consumers in other states are included to describe the harm, its
 23 widespread nature, and the defendants’ knowledge; they do not preclude the State of California
 24 from being the real party in interest. *See* Compl. ¶ 104-11. These arguments do not show that the
 25

26 ¹ The defendants’ assertion that San Francisco’s population has fallen below the 750,000-person
 27 threshold required by another subsection of this statute is unpersuasive, because the statute clearly
 28 authorizes the city attorney of any “city and county” to bring such suits. Cal. Bus. & Prof. Code
 § 17206(a). The defendants do not appear to contest authorization under this subsection.

1 State is not the real party in interest.²

2 The nature of the proceedings show that California is the real party in interest.

3 **II. NATURE OF THE RELIEF SOUGHT**

4 The City seeks three types of relief: injunctive relief under California Business and
5 Professions Code section 17200, restitution under section 17203, and civil penalties under
6 sections 17200 and 17206. The defendants argue that these requests are available to many parties,
7 including private individuals, but that the State can only be the real party in interest where the
8 relief sought is available to the State alone. Pathward Oppo. 11.

9 As a preliminary matter, and contrary to the defendants' framing, the nature of the relief
10 requested is neither a standalone element nor dispositive for determining the real party in interest.
11 All cases discussing this jurisdictional inquiry address the relief requested as one consideration
12 among many, though it is often one of the most important. *See, e.g., Homeaway.com, Inc.*, 2023
13 WL 2497862, at *4 (assessing the relief requested as well as other considerations in concluding
14 that the state was the real party in interest); *Purdue Pharma*, 2014 WL 6065907, at *3 (same); *see also Lucent*, 642 F.3d at 738–39 (agreeing with defendants that the relief requested supported the
15 finding that the individual was the real party in interest, but relying on other considerations in final
16 determination). Recognizing its importance to the inquiry, I discuss it separately here.

17 The relief requested here favors finding that California is the real party in interest. First,
18 under the statute at issue, civil penalties are available only to the government, not to private
19 litigants. *See Cal. Bus. & Prof. Code § 17206*. Where relief is “available to [the government]
20 alone” rather than “to individual consumers,” this favors finding the State is the real party in
21 interest. *Nevada*, 672 F.3d at 671–72; *see also Homeaway.com, Inc.*, 2023 WL 7497862, at *3
22 (reaching same conclusion based in part on relief requested); *Purdue Pharma*, 2014 WL 6065907,
23 at *3 (same). And though the defendants argue that the State cannot be the real party in interest
24

25
26 ² InComm's extended arguments that the City's allegations are merely “conclusory” and lack
27 merit, InComm Oppo. 3–5, are, of course, not arguments that I consider on a motion to remand
when determining if I have subject matter jurisdiction to even consider the merits of the case. *See*
28 *In re Facebook*, 354 F. Supp. 3d at 1136 (“Of course, we don't yet know if [the plaintiff's] claims
have merit, but that's not the point. The point is that she has the right, on behalf of the State of
Illinois, to assert these claims and attempt to vindicate these interests.”).

1 where penalties flow to the city, I agree with the court in *Homeaway.com, Inc.*, 2023 WL
 2 7497862, at *3, which rejected that argument and determined that where the money flows is less
 3 important than what it is used for. Here, as there, the money is statutorily required to be used “to
 4 advance a State interest—the enforcement of consumer protection laws.” *Id.* (citing Cal. Bus. &
 5 Prof. Code § 17206(c)(4)). This supports the finding that the State is the real party in interest.

6 Second, while injunctive relief is available to individuals and the government, the State is
 7 subject to a lower evidentiary standard, which other courts have found sufficient for serving state
 8 interests. *See Purdue Pharma*, 2014 WL 6065907, at *3 (finding the relief sought showed that
 9 California was the real party in interests because “as in *Nevada*, Plaintiff seeks injunctive relief
 10 that is subject to a lesser evidentiary standard than for private individuals” (first citing Cal. Bus. &
 11 Prof. Code §§ 17204, 17535; and then citing *Nevada*, 672 F.3d at 671)). Here, too, the relief
 12 benefits state interests, which shows that the State is the real party in interest.

13 Third, the fact that the lawsuit seeks restitution for individual consumers does not negate
 14 the state interest in this case. Indeed, the Ninth Circuit in *Nevada* rejected this very argument and
 15 held that the state’s “sovereign interest in protecting its citizens and economy … is not diminished
 16 merely because it has tacked on a claim for restitution.” *Nevada*, 672 F.3d 671 (9th Cir. 2012);
 17 *see also In re Facebook*, 354 F. Supp. 3d at 1127 (same).

18 Finally, the defendants cite a case from the Eastern District of Pennsylvania that applied
 19 California law and reached a contrary conclusion with respect to the real party in interest. *See In*
20 re Avandia Mktg., Sales Pracs. & Prod. Liab. Litig., 238 F. Supp. 3d 723, 729 (E.D. Pa. 2017).
 21 But in a well-reasoned opinion, the Hon. Vince Chhabria determined that it likely misapplied the
 22 law. *See In re Facebook*, 354 F. Supp. 3d at 1135. It is apparently the only case to find diversity
 23 jurisdiction on parallel facts under California law. Judge Chhabria’s analysis is persuasive and
 24 defendants’ reliance on that case is misplaced.

25 Accordingly, the requested relief supports my conclusion that the State is the real party in
 26 interest.

27 * * *

28 The State of California, therefore, is the real party in interest in this lawsuit. Because

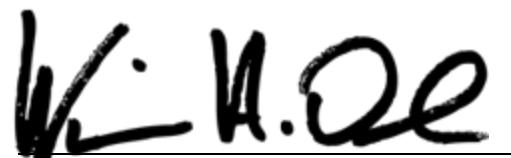
1 California is not a citizen, and this case was brought under California law, I do not have
2 jurisdiction. *See Mississippi*, 571 U.S. at 174.

3 **CONCLUSION**

4 For those reasons, the motion to remand is GRANTED. I ORDER that this case be
5 REMANDED to the California Superior Court for the County of San Francisco.

6 **IT IS SO ORDERED.**

7 Dated: March 26, 2024



8
9
10 William H. Orrick
11
12 United States District Judge
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28